Supreme Court, U.S.
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No. 97-990

In the Supreme Court of the United States

OCTOBER TERM, 1997

FLOYD E. RILEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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12 pp

QUESTION PRESENTED

Whether an assessment of liability against petitioner under Section 6672 of the Internal Revenue Code, 26 U.S.C. 6672, that was made after the automatic stay in his bankruptcy case expired is invalid because an administrative notice proposing the assessment was issued during the period of the automatic stay.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A7-A11) is reported at 118 F.3d 1220. The opinion of the district court (Pet. App. A1-A5) is reported at 192 B.R. 727.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 1997. The petition for rehearing was denied on September 16, 1997. The petition for certiorari was filed on December 15, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. During the first three quarters of 1990, Ferco Fabricators, Inc., withheld more than $680,000 in social security and federal income taxes from the wages of its employees. Those taxes were not, however, remitted to the government (Pet. 2; Pet. App. A7-A8). Petitioner was the majority shareholder and chairman of the board of directors of Ferco throughout most of this period (Pet. App. A7).

In September 1991, petitioner sought relief under Chapter 7 of the Bankruptcy Code (Pet. App. A8). The filing of his bankruptcy petition "operate[d] as a stay, applicable to all entities, of * * * any act to collect, assess, or recover a claim against [petitioner] that arose before" the date that the petition was filed. 11 U.S.C. 362(a)(6).[1]

In May 1992, while the automatic stay was in effect, the Internal Revenue Service notified petitioner that it proposed to assess a penalty against him in the amount of $683,675.24 under 26 U.S.C. 6672. That statute imposes a liability against any "person required to collect, truthfully account for, and pay over" withheld taxes who willfully fails to do so. The amount of the proposed assessment was equal to the amount of the 1990 federal withholding taxes that Ferco had failed to pay over to the United States. The letter advised petitioner that he could either

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[1] Section 362(b) of the Bankruptcy Code lists certain exceptions to the automatic stay. After petitioner's bankruptcy case concluded, the Bankruptcy Code was amended prospectively to provide that "the making of an assessment for any tax" is excepted from the automatic stay. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 116, 108 Stat. 4119. The amendment, which is codified as 11 U.S.C. 362(b)(9)(D), became effective October 22, 1994. § 702(a), 108 Stat. 4150.

agree to the proposed assessment or file an appeal with the IRS within 30 days. Petitioner protested the proposed assessment on the merits and also claimed that it violated the automatic stay (Pet. App. A8).

The automatic stay in bankruptcy expired in June 1992, when the bankruptcy court discharged petitioner of all dischargeable debts (Pet. App. A3). See 11 U.S.C. 362(c). More than a year later, in August 1993, the Internal Revenue Service assessed the amounts due from petitioner under Section 6672. Petitioner paid a divisible portion of the assessment and filed an administrative claim for refund. After the Service denied the claim, petitioner commenced this refund suit (Pet. App. A8).

2. The district court held that the notice of proposed assessment violated the automatic stay and was "void *ab initio*" (Pet. App. A5). The court granted judgment to petitioner on the theory that the notice of proposed assessment "led to" the assessment and that the assessment was therefore invalid (*ibid.*).

3. The court of appeals reversed. The court concluded that the notice of proposed assessment violated the automatic stay, but that the assessment itself—"issued long after the automatic stay expired"—did not (Pet. App. A9). The court noted that, at the time the events of this case transpired, nothing in the Internal Revenue Code required the Service to issue a notice of proposed assessment before issuing the assessment itself.[2] The court concluded that, even if

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[2] Several years after the events in this case, Congress amended the Internal Revenue Code to require that a notice of a proposed assessment be issued prior to assessment under Section 6672. Pub. L. No. 104-168, § 901, 110 Stat. 1465-1466. The amendment, which is codified at 26 U.S.C. 6672(b), applies

the Service ordinarily issued a notice before issuing an assessment under Rev. Proc. 84-78, 1984-2 C.B. 754, that does not make that procedure mandatory: "Revenue Procedures that involve distinctly procedural matters not otherwise controlled by statute * * * are not binding on the agency" (Pet. App. A10). The court held that it would not invalidate an assessment because of a "void" notice "that the agency was under no obligation to issue in the first place" (*ibid.*). The court therefore found it unnecessary to address the "theoretical question" whether the stay violation rendered the assessment "void ab initio, rather than merely 'voidable'" (*id.* at A9 n.1).

The court of appeals also rejected petitioner's alternative argument. Petitioner contended that the assessment should be held invalid as a remedy for the violation of the automatic stay that occurred when the notice of *proposed* assessment was issued. The court concluded that "[w]hatever remedy [petitioner] might be entitled to for the IRS's stay violation is irrelevant to his burden in bringing this refund action" (Pet. App. A10).

The court of appeals therefore reversed the grant of summary judgment in petitioner's favor and remanded the case for further proceedings in the district court (Pet. App. A11).

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only to assessments proposed after June 30, 1996. § 901(b), 110 Stat. 1466.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Section 6672 of the Internal Revenue Code imposes personal liability on individuals who are responsible for collecting and paying over "trust-fund taxes" on behalf of a corporation but who willfully fail to do so. *Slodov* v. *United States*, 436 U.S. 238, 244-245, 246 n.7 (1978); see 26 U.S.C. 7501. Like other federal tax assessments, an assessment of liability under 26 U.S.C. 6672 is presumptively correct. *United States* v. *McCombs*, 30 F.3d 310, 318 (2d Cir. 1994); *Ruth* v. *United States*, 823 F.2d 1091, 1094 (7th Cir. 1987); *Anderson* v. *United States*, 561 F.2d 162, 165 (8th Cir. 1977). The person against whom Section 6672 liability has been assessed has the burden of proving that he is not responsible or that he did not act willfully in failing to pay over the withheld taxes. *Olsen* v. *United States*, 952 F.2d 236, 239 (8th Cir. 1991).

In his motion for summary judgment, petitioner did not challenge the validity of the Section 6672 assessment on the merits. Instead, he asserted only that the notice of the proposed assessment had been issued in violation of the automatic stay in his bankruptcy case and that the subsequent assessment should therefore be held void. The court of appeals correctly rejected that contention.

Upon the filing of a petition for relief in bankruptcy court, Section 362(a)(6) of the Bankruptcy Code stays "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the [bankruptcy] case." 11 U.S.C. 362(a)(6). The assess-

ment that petitioner challenges in this tax refund suit, however, "was issued long after the automatic stay expired" (Pet. App. A9). The fact that the Service had issued a "notice" of a "proposed" assessment of that tax during the period when the automatic stay was in effect does not make the subsequent assessment itself invalid. As the court of appeals explained, there was no requirement that the Service issue a notice of "proposed" assessment before issuing the assessment in this case (*id.* at A10).[3] Even if the notice of proposed assessment were "void," as petitioner contends (Pet. 4), that would not invalidate the actual assessment of the tax made "long after" the automatic stay expired (Pet. App. A9).

The court of appeals also correctly rejected the contention that petitioner should be absolved from his tax liability as a "remedy" for the issuance of the "proposed" assessment during the period when the automatic stay was in effect (Pet. App. A10). Congress has prescribed a remedy for violations of the automatic stay. Section 362(h) of the Bankruptcy Code authorizes the recovery of compensatory damages, including attorneys' fees, and punitive damages by individuals who are injured by a willful violation of the automatic stay. 11 U.S.C. 362(h); see also 11 U.S.C. 106(a)(1) and (3) (waiving sovereign immunity

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[3] As the court of appeals correctly held, Rev. Proc. 84-78, 1984-2 C.B. 754, which sets forth a notice of proposed assessment scheme, was distinctly procedural and not binding on the IRS. See *Estate of Jones* v. *Commissioner*, 795 F.2d 566, 571-572 (6th Cir. 1986); *Rosenberg* v. *Commissioner*, 450 F.2d 529, 532-533 (10th Cir. 1971); *Cleveland Trust Co.* v. *United States*, 421 F.2d 475, 481-482 (6th Cir.), cert. denied, 400 U.S. 819 (1970); *Luhring* v. *Glotzbach*, 304 F.2d 560, 563-565 (4th Cir. 1962). See note 2, *supra*.

under Section 362, but not for punitive damages). Exoneration of tax liability is not among the prescribed remedies. As the court of appeals correctly noted, whatever the remedy (if any) to which petitioner might be entitled in a proceeding to enforce the automatic stay, it "is irrelevant to [petitioner's] burden in bringing this refund action" (Pet. App. A10). In a refund suit, petitioner must "show that he is not a responsible person or that he did not act willfully in failing to pay Ferco's trust fund taxes" *ibid.* The court of appeals properly remanded the case to the district court for further proceedings on those issues (*id.* at A11).

2. Petitioner errs in contending that the decision in this case implicates a conflict among the courts of appeals as to whether an act that violates the automatic stay is "void" or merely "voidable" (Pet. 4-9). The court of appeals correctly concluded that "this theoretical question [is] beside the point" because the assessment in question was made *after* the stay expired and thus did not violate the automatic stay (Pet. App. A9 n.1): it was neither "void" nor "voidable." That holding does not conflict with any of the decisions that petitioner cites.

3. The court of appeals reversed the award of summary judgment to petitioner and remanded this tax refund case for further proceedings in the district court (Pet. App. A11). Petitioner may now challenge the assessment of liability against him on the merits. If petitioner prevails on remand, and is awarded the refund that he seeks, the issue that he purports to frame in this petition would be made moot. Review of the interlocutory decision of the court of appeals is thus not warranted for this additional reason. See

Brotherhood of Locomotive Firemen & Enginemen v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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